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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858

[redacted], MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants (Wilson, Lefkowitz, Fine and Bleisheim) appeal from a final judgment of the United States District Court for the Southern District of New York entered on November 6, 1974, which declared unconstitutional New

York Civil Practice Law and Rules (CPLR) 6201, subsec. (4), (5) and (8) and enjoined their enforcement. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States. A similar statement is being filed independently by the appellants Curtis Circulation Company and Continental Casualty Co.

Opinions Below

The opinion and order of the District Court convening the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 is reported below at 377 F. Supp. 1055 and reproduced herein as Appendix "B" (15a).

The opinion of the three-judge court is not yet reported. It is reproduced herein as Appendix "A" (1a).

Jurisdiction

This suit was brought pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 to declare unconstitutional and enjoin the operation of New York's attachment statute (N.Y. Civil Practice Law and Rules 6201 *et seq.*) as it allows attachment under CPLR 6201, subsec. (4), (5) and (8). The final judgment of the District Court was entered November 6, 1974. The State defendants filed their notice of appeal on November 27, 1974; the defendants Curtis Circulation and Continental Casualty filed their notice of appeal on November 29, 1974. Copies of the judgment and notices of appeals are attached as Appendices "C", "D" and "E". The jurisdiction of the Supreme Court to review the decision and judgment herein is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Statute Involved

New York Civil Practice Law and Rules (CPLR) 6201 (4), (5) and (6), 6211 and 6223. The pertinent provisions of 6201 and 6211 are found at footnote 1 of the three-judge court opinion (Appendix "A", 1a) and the entire Article 62 of the CPLR is Appendix "F" (37a).

Questions Presented

1. Does New York's Civil Practice Law and Rules, Article 62 violate any due process requirements of the Fourteenth Amendment in the procedure provided for judicially supervised *ex parte* orders of attachment?

2. Was the District Court correct in concluding the supposed lack of a meaningful opportunity to vacate an order of attachment renders the statute unconstitutional?

3. Is the existence of a vendor's lien and possessory interest necessary to the constitutionality of an attachment statute?

Facts

This is an action for declaratory and injunctive relief brought pursuant to the Civil Rights Law to vacate an attachment granted pursuant to New York CPLR Article 62 on grounds stated in CPLR 6201 (4), (5) and (8).

A three-judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284, held New York CPLR 6201 (4), (5) and (8) unconstitutional primarily for failure to afford an attachee such as appellees a meaningful opportunity to vacate the attachment granted *ex parte*. It also appeared to find alternative grounds in the attaching party's lack of a possessory interest and vendor's lien in the property attached. On November 6, 1974, a final judgment dated

November 1, 1974, was entered, which included a determination that CPLR 6201, subsec. (4), (5) and (8), as allowed under CPLR 6211, is unconstitutional and enjoined. An injunction against enforcement issued until and unless a meaningful oportunity to vacate is provided. The Sheriff of the City of New York was ordered to release the attached property. However, the judgment also included a stay of all of the above, pending the instant appeal (31a-32a).

The underlying facts of the case are not in dispute for purposes of this appeal. They are stated succinctly in the opinion of the convening judge and the three-judge court as well as the companion Jurisdictional Statement of the appellants Curtis and Continental.

Briefly stated, appellant Curtis Circulation Company had a contract (August, 1971) with appellee Sugar and a corporation, Champion Sports.* Curtis advanced monies under a magazine distribution agreement to Champion, which the former was entitled to recover from Champion under the terms of the contract.

In due course, Curtis became aware of certain actions by Champion which indicated that it (Curtis) was being defrauded. Namely—Wrestling Revue, Inc. had sold all of the periodicals to third parties. It also appeared the moving force behind all of these transfers was Sugar. The end result would be to strip Champion of all its assets and deprive Curtis of its security under the agreement.

As a result Curtis, to protect its security (Champion's assets), applied to the Supreme Court, New York County for an order of attachment. CPLR 6201 (4), (5) and (8). In accordance with statute, this application was supported by, as the opinion of the three-judge court states, "an extensive and detailed affidavit" (2a).

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* Curtis contends that Champion was actually non-existent.

Three grounds were asserted:

(a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201(4)];

(b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and

(c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)].

In addition, Curtis posted a $10,000 bond to protect the defendant in the event the latter prevails or if it is finally decided the attachment was improper. This would cover all legal costs and damages. CPLR 6212(b). The attachment was granted, and within 10 days the papers were filed as well as the summons and complaint, *id.*, 6212(c). The Sheriff levied on the property and without any further state court proceeding—i.e. seeking to vacate the attachment CPLR 6223, the appellees instituted suit in federal court. This resulted in the judgment all defendants, except the Sheriff (McCloskey) who never appeared, have appealed.

The Questions Presented on this Appeal are Substantial

This Court has only the last-term announced that a deprivation of private property need not be preceded by a hearing. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611 (1974). Indeed, this Court in *Mitchell,* cited its prior unanimous approval of prejudgment attachment liens effected by creditors, without notice, hearing or even judicial order. *Mitchell* at 613 citing *Coffin Bros.* v. *Bennett,* 277 U.S. 29, 31 (1928). See also *Ownbey* v. *Morgan,* 256 U.S. 94 (1921).

It is against this background, that the three-judge court nevertheless found the New York attachment statute unconstitutional.

The district court's opinion read *Mitchell* as a limited exception to the *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), that there must be notice and an opportunity for a hearing before a person can be deprived of property, Id., at 80, 81, 82. To the contrary, it is just as clear from *Mitchell* that the three judge court read *Fuentes* too broadly.* The Louisiana sequestration statute ruled constitutional in *Mitchell* permitted seizure of a chattel pursuant to court order obtained *ex parte*. Reading *Fuentes* and *Mitchell* together, the apparent distinction is that in *Fuentes* there was no court order and no notice to the defendant while in *Mitchell* there was a court order but no notice. *Mitchell* laid down the rule "that a hearing must be had before one is *finally* deprived of his property . . .", Id. at 611. As determined by *Mitchell*, the problem is not lack of notice, but lack of a court order. Notice and hearing can be postponed.

The district court grudgingly read *Mitchell* as only leaving a "narrow door of constitutionality" (6a), and persisted in the expansive view that *Fuentes* stated the general binding rule of unconstitutionality for prejudgment *ex parte* procedures. This delimitation of *Mitchell* by the district court and expansion of *Fuentes* appears to be clearly erroneous. The attachment provisions of long standing in New York and other states as traditional remedies in creditor-debtor relations should not suffer this delimitation.

In fact, there are numerous parallels between the Louisiana statute, Code of Civil Procedure (C.C.P.), and New York's procedure (7a-8a, 27a-28a).

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* It should be noted five Justices of this Court (four of whom dissented and one of whom concurred (POWELL, J.) stated that *Fuentes* was overruled by *Mitchell*. 416 U.S., at 623, 634.

(1) A court order is required; *Mitchell*, id. at 616; Cf. La. C.C.P. Art. 281, 282, 283; N.Y. CPLR 6212(a).

(2) An affidavit is required to demonstrate the grounds for seizure, *Mitchell*, id. at 616, La. C.C.P. Art. 3501; N.Y. CPLR 6212(a).

(3) The attaching creditor must post a bond; La. C.C.P. Art. 3574; N.Y. CPLR 6212(b).

(4) The defendant has the right to regain possession of his property by posting a bond; La. C.C.P. Art. 3507, N.Y. CPLR 6222.

(5) The statute—

> "entitled the debtor immediately . . . to seek dissolution of the writ, which must be ordered unless the creditor proves the grounds upon which the writ issued . . ., failing which the court may order return of the property and assess damages in favor of the debtor including attorney fees." (8a) La. C.C.P. Art. 3506.

The first four as recited in *Mitchell* were found present in New York's statute. It was only the fifth which was found lacking on the basis of the District Court's reading of CPLR 6223. Assuming the district court was correct in its reading of New York law on the scope of the hearing under CPLR 6223 to vacate an attachment,* this reading raises the substantial question whether the fact by itself that defendant has the burden of proof in New York (9a) thereby renders the statute unconstitutional, as determined

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* The decision, 8a, calls 6223 the "sole mechanism available to a defendant who seeks to vacate the attachment." This is obviously erroneous as CPLR 6222 permits discharge of the attachment by posting a bond.

by the district court, despite all the fundamental similarities.

Contrary to the opinion below, 8a, the "sole basis" for vacating an attachment is *not* that the attachment "is unnecessary to the security of the plaintiff" CPLR 6223. It is just one ground for vacating an attachment. Another ground is that the attachment was unauthorized in the particular action. See *Maitrejean* v. *Levon Properties Corp.*, 45 A D 2d 1020, —— N.Y.S.2d —— (2d Dept. 1974). In *Maitrejean* the appellate court stated ". . . plaintiffs have failed to establish any intent to defraud creditors." Contrary to the District Court's conclusion as a matter of law the attaching plaintiff has the burden to establish the grounds for the attachment.

The district court made the observation (9a) that the merits of the action are irrelevant on a motion to vacate the attachment under § 6223. However, the same situation obtains in Louisiana. *Tucker & Schonekas* v. *Al Dohmann Chevrolet, Inc.*, La. App., 260 So. 2d 99, 100-101 (1972) ("Official Revision Comment (c) under Article 3506 states that only the grounds for the auxiliary remedy, i.e., dissolution of the writ and damages for wrongful sequestration, may be inquired into on the motion to dissolve and not the merits of the main demand"). In *Lindsey* v. *Normet*, 405 U.S. 56, 64 (1972), this Court held that it was "unable to conclude that . . . limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment" as concerns an action to recover possession of realty.

Furthermore, to distinguish *Mitchell* on the basis of a vendor's lien (10a) is to put form above substance. And to state that the fraud ground for attachment 6201(8) is unsuitable for determination on documentary proof alone (11a), is to ignore that the determination does not concern the merits and that Curtis obtained the attachment on three grounds, and fraud plays only a part therein (6201[4], [5] and [8]). A cause of action asserting fraud is easy to determine. Indeed, the provision for fraudulent intent in 6201[4], is more protective than La. C.C.P. Art. 3571, which allows sequestration on a simple claim of ownership, or a mortgage, lien, or privilege thereon, "if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues. . . ." There is no issue therein as to actual *intent*. Cf. CPLR 6201[4]. This Court has also declared that "(t)o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide. . . ." *Rothschild* v. *Knight*, 184 U.S. 334, 341 (1902).

If the district court had followed *Mitchell*, it would have looked at New York procedure "as a whole", 416 U.S., at 610, to see that the state statute has reached a constitutional accommodation of the respective interests of the parties. The attachment procedures are of such pervasive effect in the entire nation as to warrant plenary consideration.* Already the instant decision has been questioned by a recognized commentator in New York, Dean Joseph M. McLaughlin of the Fordham Law School; New York Trial Practice, New York Law Journal, Nov. 8, 1974, p. 1.

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* This Court has granted *certiorari* in *North Georgia Finishing Inc.* v. *DiChem, Inc.*, 417 U.S. 907 (5/28/74) to review 231 Ga. 260, 201 S.E. 2d 321 (1973). This involves pre-judgment garnishment (or attachment) *without* a court or judge's order, a distinction from the instant case.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Dated: New York, New York, December 31, 1974.

Respectfully submitted,

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Appendix A, Opinion of Three-Judge Court Sugar v. Curtis Circulation Company (S.D.N.Y. 74 Civ. 78).

This suit attacks the constitutionality of the New York Attachment Statute, CPLR § 6201 *et seq.*, which permits ex parte pre-judgment attachment of the property of a defendant. In particular, it is claimed that CPLR § 6201 (4)(5) and (8), and CPLR § 6211,[1] which collectively allow such attachment upon a plaintiff's ex parte allegation that the defendant has defrauded him, violate the due process clause of the Fourteenth Amendment in depriving the defendant of property without prior notice or hearing. Jurisdiction is alleged under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, 2202, 2281, and 2284, and plaintiffs seek declaratory and injunctive relief. By an earlier opinion, —— F. Supp. —— (1974), a single judge found that the complaint presented a substantial constitutional question under the test of *Goosby* v. *Osser,* 409 U.S. 512 (1973) and *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962). This three judge court was convened to hear the matter pursuant to 28 U.S.C. § 2281 *et seq.*

I.

Familiarity with the facts set forth in detail in the opinion of the convening judge is assumed. For present purposes it is sufficient to state that in August, 1971 plaintiff Sugar and his controlled corporation, Champion Sports Publishing, Inc. (Champion) contracted with defendant Curtis for the distribution by Curtis of Champion's publications. In the course of their dealings Curtis advanced funds to Champion which it was entitled to recoup under the terms of their agreement.

Sugar's corporate satrapy also included a publisher, Wrestling Revue, Inc. (Westling), a plaintiff here. About a year after the consummation of the Champion-Curtis con-

tract, Curtis learned—or came to believe—that it had been defrauded because Wrestling, claiming to own periodicals which Curtis had the right to distribute under the Champion agreement, had contracted to sell some of them to third parties.

Curtis thereupon notified one such third party, National Sports Publishing Corporation (National, a defendant here), that it asserted a claim to moneys payable by National to Wrestling. National's response was to advise Wrestling and Sugar that it was withholding sums payable by National to Wrestling. On March 5, 1973, Wrestling sued National for breach of contract in New York Supreme Court, Westchester County. Subsequent to commencement of the Westchester action, Curtis moved in New York Supreme Court, New York County, without notice to Sugar, Champion or Wrestling, and prior to the filing of a complaint, for an order directing the Sheriff to levy on any property of Sugar, Champion or Wrestling. Curtis' motion, supported by an extensive and detailed affidavit, was based on its claim that:

> (a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201 (4)];
>
> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and
>
> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)].

Curtis asserted that it was owed approximately $28,500. plus probable interest, Sheriff's fees and expenses. It

posted a $10,000 bond to protect Sugar, Champion and Wrestling against the possibility that its claim was not ultimately proven. On April 13, 1973, still prior to Curtis' commencement of suit against Sugar, Champion and Wrestling, and without notice to them, but in accordance with CPLR § 6201 *et seq.* Mr. Justice Fine granted the order of attachment.

The attachment order and the consequent sheriff's levy on National,[2] precipitated this suit in which the original roles of the parties are reversed. Sugar and Wrestling are recast as the plaintiffs, while Champion and National are two defendants in a large group including the sheriff and various state officials charged with the enforcement of the statutes under attack.

II.

Although the facts are relatively complex, the issue before us is a narrow one[3] because several recent Supreme Court decisions have dealt with similar statutes. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Mitchell* v. *W. T. Grant Co.*, 43 U.S.L.W. 471 (U.S., May 13, 1974).

Prior to *Sniadach*, decisions of the Court consistently sustained the constitutionality of prejudgment seizure of property subject to litigation, reasoning that ultimate adjudication on the merits would assure a defendant's rights. See, e.g., *Ownbey* v. *Morgan*, 256 U.S. 94 (1921); *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29 (1928) and, particularly *McKay* v. *McInnes*, 279 U.S. 820 (1929) *affirming per curiam* the constitutionality of a Maine statute which provided for an ex parte order of attachment without requiring a supporting affidavit or plaintiff's bond.[4] *Sniadach* breached this previously impenetrable wall of

authority. At issue in that case was the Wisconsin garnishment statute, which permitted a creditor to require the employer of a defendant alleged to be his debtor to withhold part of the defendant's wages pending final adjudication on the merits. The Court invalidated the statute holding that "absent notice and prior hearing [citation omitted] this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 342. In concurrence Mr. Justice Harlan emphasized "that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property *or its unrestricted use,*" 395 U.S. at 343 (emphasis added). Although *Sniadach* rested on broad principles of due process, its intended impact was carefully limited. As the *Mitchell* Court later observed:

> "*Sniadach* involved the prejudgment garnishment of wages—'a specialized type of property presenting distinct problems in our economic system.' [citing Sniadach] Because '[t]he leverage of the creditor on the wage earner is enormous' and because 'prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall,' it was held that the Due Process Clause forbade such garnishment absent notice and hearing. *Sniadach,* 395 U.S. at 341-342. In *Sniadach* the Court also observed that garnishment was subject to abuse by creditors without valid claims. . . ." 42 U.S.L.W. at pp. 4675-76.

These qualifications limit the significance of *Sniadach* as a guide to the determination of the issue before us.

The ruling in *Fuentes* v. *Shevin, supra,* is much closer to home. *Fuentes* dealt with the constitutionality of the Florida and Pennsylvania replevin Statutes which, as the *Mitchell* Court observed,

> ". . . permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause." 42 U.S.L.W. at 4676.

Starting from the premise that "a temporary nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," the *Fuentes* court broadened the *Sniadach* rule beyond cases involving the necessities of life, and held that, with the limited exceptions,[5] the Due Process Clause requires an opportunity for a hearing prior to a deprivation of property:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession from arbitrary encroachment—to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed the prohibition against the deprivation of property without

> due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." 407 U.S. at 80-81.

Lower courts generally construed *Fuentes* to hold that, with the exceptions already noted,[6] statutes permitting pre-judgment seizure of property without prior notice were at best suspect and at worst unconstitutional; accordingly *Fuentes* toppled a variety of state replevin statutes and similar provisions permitting such ex parte seizures. That case, however, is not the final word on the constitutional adequacy of pre-judgment ex-parte seizure of property.

In *Mitchell* the Court seriously narrowed the impact of *Fuentes*—so seriously indeed that Justice Powell and Brennan believed the majority to have overruled *Fuentes*. *Mitchell*, like *Fuentes*, involved a Louisiana statute authorizing ex parte prejudgment seizure of property subject to a vendor's lien. However, the Court found constitutionally significant differences between the Florida and Pennsylvania statutes at issue in *Fuentes* and the Louisiana law before it, whose validity it sustained. The issue before us, therefore, is whether the New York provisions, CPLR §§ 6201(4), (5) and (8) and § 6211, squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*.

Mitchell found several procedural assurances which critically distinguished the Louisiana statute from the Florida and Pennsylvania provisions in *Fuentes:* (1) *Judicial* approval of the sequestration order was required; (2) the grounds for sequestration had to be clearly demonstrated in the affidavit supporting the writ; (3) the attaching creditor was obliged to post a bond; (4) the buyer

(debtor) had the right to regain possession of his property by posting a bond and finally, (5) the statute "entitles the debtor immediately [after sequestration] to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued', Art. 3506, the existence of the debt, lien and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees." *Mitchell*, 42 U.S.L.W. at 4673.

III.

There is no doubt that, as Curtis argues here, there are substantial parallels between the pertinent CPLR provisions and the Louisiana provisions upheld in *Mitchell:* New York law (CPLR § 6219a) meets *Mitchell's* requirements that an attachment order be subject to judicial approval and based on a showing by affidavit that there is a cause of action and establishing one or more grounds for issuance of an order of attachment. Like the creditor in *Mitchell*, moreover, a New York creditor must post a bond to indemnify the defendant-debtor against damages and fees in the event that the attachment is ultimately proven to have been unjustified (CPLR § 6212(b)). Finally, the New York statute, like the Louisiana statute, enables the debtor-defendant to regain possession of his attached property by posting a bond, CPLR § 6222. Taken together, therefore, the New York provisions contain all but one of the indices which led the *Mitchell* court to find the Louisiana statute constitutional.

Unlike the Louisiana statute, however, the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must

prove the grounds "upon which the writ issued." (42 U.S.L.W. at 4673.)

We find that the opportunity for such a hearing was critical to the holding in *Mitchell*, and that its absence renders New York's statute fatally defective.

IV.

It is true that under the New York law a defendant has the right to move to vacate the attachment. Section 6223 of the statute provides in pertinent part:

> "Prior to the application of property or debt to the satisfaction of a judgment, the defendant . . . may move, on notice to each party and the Sheriff, for an order vacating . . . the order of attachment . . . If, after the defendant has appeared in the action, the court determines *that the attachment is unecessary to the security of the plaintiff*, it shall vacate the order of attachment." (emphasis added)

There are several reasons why § 6223—the sole mechanism available to a defendant who seeks to vacate the attachment—does not meet the standards of the *Mitchell*-Louisiana statute which provided in straightforward language (Article 3506, Louisiana Code of Civil Procedure): "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration *unless the plaintiff proves the grounds upon which the writ was* issued." (emphasis added)

By its terms, that is, the Louisiana law required that the attachment be vacated unless the grounds upon which it was issued are proven, and imposed the burden of such proof on the creditor.

The New York Statute affords neither protection. The sole basis for vacating the attachment under the CPLR is *not* that the grounds upon which it has been issued are unproven, but rather that the attachment "is unnecessary to the security of the plaintiff"; and the burden of proof is not, as in *Mitchell*, on the plaintiff, but on the defendant.

That this is not too narrow or literal a reading of the language of 6223 is resoundingly confirmed by numerous holdings of the New York courts. Without exception they have ruled—for at least 50 years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based "clearly indicate that the plaintiffs must ultimately fail." *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 377 (1923). The burden is on the defendant to establish that the plaintiff *cannot* succeed, *Bard-Parker Co.* v. *Dictagraph Products Co.*, 258 App. Div. 638, 17 N.Y.S. 2d 588 (1st Dept. 1940); and to demonstrate that the plaintiff has not established a cause of action which permits attachment, *American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N.Y. 322, 325 (1948); and to establish that the attachment is unnecessary for the security of the plaintiff, *Hydromar Corp. of Delaware* v. *Construction Aggregates Corp.*, 32 A.D. 2d 749, 300 N.Y.S.2d 797 (1st Dept. 1969); *George A. Fuller Co.* v. *Vitro Corp. of America*, 26 A.D.2d 916, 274 N.Y.S.2d 600 (1st Dept. 1966). *See also B.B. Weit Printing Co., Inc.* v. *Frances Denney, Inc.*, 300 F. Supp. 405, 408 (S.D.N.Y. 1969).

Indeed under the decisions of New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223—a construction which we believed is proper in the light of the strictly limited word-

ing of the law. *Kneapler* v. *Braufman*, 266 App.Div. 756, 41 N.Y.S.2d 261 (2d Dept. 1943); *Bard-Parker Co., Inc.* v. *Dictagraph Products Co., supra.* As Judge Motley put it in *Marklin* v. *Drew Properties Corp.*, 280 F.Supp. 176, at 179 (S.D.N.Y. 1967):

> "Under the law of New York it is settled that • • • the court should not attempt to decide in advance the merits of the controversy by vacating the attachment unless the complaint and affidavits *clearly indicate* that the plaintiff *must ultimately fail.*" (emphasis in original)

These considerations alone would be dispositive; but we believe that there are other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone.

First, the plaintiff-creditor in *Mitchell* had by virtue of a vendor's lien an actual possessory interest in the attached property, a fact the Court thought significant:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite,* where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property . . ." 42 U.S.L.W. at 4672-73.

In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion.

Second, in *Mitchell* the sole issues before the Louisiana court which granted the sequestration order were "the existence of the debt, the lien and the delinquency." As the Supreme Court commented, "These are ordinarily uncomplicated matters that lend themselves to documentary proof," 42 U.S.L.W. at 4674, ". . . documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default." 42 U.S.L.W. at 4674 and 4677.

Here, on the other hand, the issue before the state court considering the issuance of the attachment order was whether Sugar, Champion and Wrestling had defrauded Curtis. The Supreme Court itself has emphasized that such issues, which involve determination of subjective elements of motive and intent, are notably unsuitable to determination on documentary proof alone. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Indeed, the *Mitchell* court relied upon this principle in distinguishing the facts before it from those present in *Fuentes:*

> "As in *Bell* v. *Burson, supra,* where a driver's license was suspended without a hearing, when the suspension was premised on a fault standard, see *Vlandis* v. *Kline,* 412 U.S. 441, 446-7 (1973), in *Fuentes* this fault standard was thought ill suited for preliminary *ex-parte* determination." 42 U.S.L.W. at 4677.

A similar conclusion is mandated here. The questions of fraud alleged by Curtis in its motion for attachment are equally "ill-suited" for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief.[7]

For the reasons described we find the challenged provisions unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice. In so holding, we are guided both by the broad rule announced in *Fuentes* and *Mitchell's* insistence on the continued vitality of that rule. In particular, we find that the distinctive procedural features found in *Mitchell* to validate the Louisiana statute are critically incomplete in the New York scheme as construed by the New York courts.

Settle order on notice.

Dated: New York, New York
October 19th, 1974.

WILFRED FEINBERG C.J.

MORRIS E. LASKER D.J.

RICHARD OWEN D.J.

FOOTNOTES

[1] § 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

§ 6211. Order of attachment

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

[2] In accordance with the sheriff's levy, National paid to the sheriff the moneys which it then owed Wrestling, and it has continued to pay further sums as they accrue. It has also paid the sheriff the sum of $124.17, which it owed to Sugar and which Sugar denominates "Wages," whose attachment Sugar claims to violate his due process rights under *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). The plaintiffs here claim further violation of their due process rights in that the second sheriff's levy was extended without prior notice or hearing in December, 1973 and April, 1974, for a period to expire March 24, 1975, notwithstanding the facts that Curtis had commenced its action against them, and they had interposed answers denying liability.

Appendix A, Opinion of Three-Judge Court
Sugar v. *Curtis Circulation Company*
(S.D.N.Y. 74 Civ. 78).

[3] As a three judge court convened pursuant to 28 U.S.C. § 2281 *et seq.*, we here deal only with the constitutionality of the statute. The earlier decision of the single judge determined that plaintiffs have standing to use, have not waived their right to assert the constitutional claim here, and that the pendency in state court of the earlier actions does not bar this action.

[4] The Maine statute was declared unconstitutional by a unanimous three judge court (Coffin, Circuit Judge and Gignoux and Bownes, District Judges) which relied on *Sniadach* and *Fuentes*. *Gunter* v. *Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973). The Massachusetts attachment statute, on which the Maine Act had been modelled, was declared unconstitutional in *Schneider* v. *Margossian*, 349 F.Supp. 741 (D.Mass. 1972) by a unanimous three judge court (Coffin, Circuit Judge, and Gignoux and Garrity, District Judges) relying on the same cases.

[5] The exceptions included cases in which attachment might be necessary (1) to acquire jurisdiction of the defendant; (2) "to protect the public against [some] sort of immediate harm," where it is "necessary to secure an important governmental or public interest [and] there has been a special need for very prompt action," 407 U.S. at 91; or to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods. 407 U.S. at 93. None of these considerations apply in the case at hand.

[6] Even before *Fuentes*, a number of summary prejudgment statutes had been declared unconstitutional on the authority of *Sniadach*. See citations in *Fuentes*, 407 U.S. at 72, note 5. The cases include the decision of a three judge court convened in the Northern District of New York declaring unconstitutional the New York replevin statute. *Laprease* v. *Raymours Furniture Co.*, 315 F.Supp 716 (N.D.N.Y. 1970). That statute provided for search and seizure of chattels by the sheriff upon filing of an affidavit and undertaking by the plaintiff, and without prior notice to the defendant or court order.- The Statute, subsequently cured by amendment, now requires as conditions to the seizure a court order and service by the sheriff of a copy of such order on the possessor of the chattel. CPLR § 7102(b)(d) (1971).

[7] Affidavit of Stewart J. Friedman, Paragraphs 5 through 8 inclusive, at pages 84-5 of plaintiff's appendix.

Appendix B, Opinion and Order Convening Three-Judge Court (377 F.Supp. 1055).

MEMORANDUM

LASKER, District Judge.

In recent years, the constitutionality of statutes permitting the *ex parte* prejudgment seizure of property has been increasingly open to question. In this suit, plaintiffs seek injunctive and declaratory relief againt the enforcement of Article 62 of the Civil Practice Law and Rules ("CPLR") of the State of New York, which permits prejudgment attachment of property without prior notice or a hearing. Plaintiffs claim that CPLR §§ 6201(4), (5) and (8) and 6211 are unconstitutional on their face, because they permit a deprivation of property without due process of law in violation of the Fourteenth Amendment.

Plaintiffs request the convening of a three judge court pursuant to 28 U.S.C. §§ 2281 and 2284. Defendant, Curtis Circulation Company ("Curtis"), moves to dismiss on the grounds that 1) plaintiffs lack standing to sue because they have not been deprived of property by the operation of the statute; 2) they have waived their right to assert the constitutional claim raised here; and 3) there is a prior action pending in the state courts in which plaintiffs can obtain the full relief sought here.[1]

Plaintiff, Bert Sugar, controls two corporations which publish sports periodicals, Champion Sports Publishing Inc. ('Champion") and Wrestling Revue, Inc. ("Wrestling"), a plaintiff in this action. In August, 1971, Sugar

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[1] Curtis also sought a stay of this proceeding pending decision by the Supreme Court of a case relevant to the constitutional issue raised by plaintiffs. That decision having subsequently been rendered (Mitchell v. W. T. Grant Co., —— U.S. ——, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974)), the motion for a stay is now denied as moot.

and Champion entered into a written agreement with Curtis, pursuant to which the latter was to distribute periodicals for the former. Curtis subsequently made advances to Champion which it was entitled, under the agreement, to recoup from payments received by Champion from distribution of Champion's periodicals.

After the argeement had been in effect for over a year, by which time Champion was substantially indebted to Curtis, the latter became aware of facts which led it to believe that a fraud was being perpetrated on it by Sugar and his controlled corporations. In particular, Curtis learned that Wrestling was holding itself out as the owner of periodicals which Curtis was distributing for Champion and that Wrestling had contracted to sell some of these periodicals to third parties, the consideration for the sale to be received by Wrestling and not by Champion.

As a result of these discoveries, Curtis notified one of the parties with whom Wrestling had contracted, National Sports Publishing Corporation ("National"), a defendant here, that, by virtue of the sums owed it by Champion, it was asserting a claim for the money payable by National to Wrestling. On February 28, 1973, National informed Wrestling and Sugar that it was withholding payment of a sum which became due on that date, because of the interest asserted by Curtis. On March 5, 1973, Wrestling sued National in the New York Supreme Court, Westchester County, on the ground that its failure to make the February 28th payment constituted a breach of their contract. On April 13, 1973, Curtis sued Sugar, Wrestling and Champion in the same court for the sums owing under the distribution agreement. In that action, Curtis obtained an order attaching the funds withheld by National on April 16, 1973, and National paid the sum in question to the Sheriff in compliance with the order. The attachment order also

covered money owed by National to Wrestling payable subsequent to the entry of the order. National has continued to pay over such sums to the Sheriff as they have become due. In May, the two Supreme Court actions were consolidated at the request of Sugar, Champion and Wrestling.

Thereafter, Sugar and Wrestling filed suit in this court claiming that the procedure by which the order of attachment was obtained violated their constitutional rights.

II.

Based on these facts, Curtis moves to dismiss. In the first instance, it contends that plaintiffs do not have standing to challenge the attachment procedure as an unconstitutional deprivation of property, because the order of attachment which gives rise to their attack did not in fact deprive them of any property. The argument runs as follows: When National on February 28, 1973, informed plaintiffs of their intention to withhold payment of the money which it owed them pending determination of who, as between plaintiffs and Curtis, was entitled to receive it, plaintiffs did not have possession of the funds and thus their only recourse was to sue National for breach of contract, which they subsequently did in early March. This right, Curtis argues, was entirely unaffected by the order of attachment obtained by Curtis in the second state court proceeding; attachment merely substituted the Sheriff for National as the holder of the disputed funds. Accordingly, Curtis contends, it deprived plaintiffs of nothing and left them exactly as they were prior to attachment.[2] Curtis

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[2] Curtis' imaginative argument reminds us of a song popular in the thirties, "Life is Just a Bowl of Cherries," two of whose memorable lines ran:

argues further that dissolving the attachment would effectively decide the merits of the state court litigation by according plaintiffs possession of the funds, which they did not have prior to the state court litigation and the right to which constitutes the subject of the litigation.

> "The sweet things in life, to you were
> just loaned,
> So how can you lose what you've
> never owned."

The argument, although ingenious, overlooks a crucial point. Although plaintiffs' possession of the funds was blocked prior to attachment by National's decision to withhold payment, the subsequent attachment transformed the situation in a critical respect. The superimposition, at Custis' behest, of judicial sanction on National's until then purely voluntary withholding of the money deprived plaintiffs and National of the ability to resolve their dispute. It is true that attachment did not destroy plaintiffs' right to sue National, a right which they had already exercised; however, it made the objective of the suit unattainable either by compromise or victory on the merits. As a result of the attachment, resolution of the National Wrestling conflict would no longer have resulted in possession by Wrestling of the disputed funds, since National would have had an off-set to the extent of the amount paid over to the Sheriff. CPLR § 6204. Accordingly, Wrestling and National's theretofore private disagreement could no longer be worked out between themselves, but only in conjunction with a resolution of Curtis' dispute with Champion. Clearly, this result was precisely what Curtis intended in seeking the attachment, which it now argues was merely an empty gesture. It is noteworthy that the deprivation to plaintiffs of the ability to acquire possession of the funds

through compromise with National, which at the time of attachment was only potential, is now actual, since Wrestling and National have in fact reached a settlement of their dispute, which, were it not for the attachment order, would give Wrestling possession of the funds.

Nor is it correct, as Curtis argues, that dissolution of the attachment order would place plaintiffs in a better position than they were in prior to attachment. To the contrary, dissolving the attachment order would return the funds to National, and thus reconstitute the *status quo ante* attachment. National would then be free, now as before, to turn the money over to Wrestling or to continue to withhold it.

We turn to the other grounds asserted on the motion to dismiss, which are predicated on the existence of state court proceedings involving the same parties as are before us. Curtis argues that these proceedings require dismissal, because 1) plaintiffs' failure to assert their constitutional claim in state court constitutes a waiver precluding the suit in this court; 2) relegating plaintiffs to the state courts would further the interests of judicial economy; and 3) this court should abstain pending a determination by the state court.

It is important, at the outset, to note that plaintiffs did not themselves initiate a state court proceeding in which it would have been possible to challenge the constitutionality of Article 62. The suit which plaintiffs brought was against National, not Curtis, and was brought prior to attachment. Since National was merely the garnishee, plaintiffs had no claim against it based on the validity of the attachment. Accordingly, the issue is reduced to whether the fact that Curtis sued plaintiffs obligated them to assert the claimed unconstitutionality of Article 62 as a defense in that proceeding and foreclosed them from commencing this suit.

The parties have cited no cases which are exactly on point[3] nor has our research uncovered any. However, we find guidance in opinions dealing with the appropriateness of requiring exhaustion of remedies or abstaining in cases brought under § 1983.

The decisions are legion to the effect that exhaustion is not required in § 1983 cases. *See, e.g.,* Wilwording v. Swenson, 404 U.S. 249, 251, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971) (per curiam); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967) (per curiam); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); McNeese v. Board of Education, 373 U.S. 688, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Conover v. Montemuro, 477 F.2d 1073, 1079 (3d Cir. 1972); Stradley v. Andersen, 456 F.2d 1063 (8th Cir. 1972).

As the Court stated in Monroe v. Pape, *supra,* at 183:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese, supra,* 373 U.S. at 672.

and the Court of Appeals for the Eighth Circuit has observed:

> "The law is well-settled that in such cases the very purpose of § 1983 precludes forcing a forum choice on the plaintiff by requiring exhaustion of the state's avenues of litigation." Stradley v. Anderson, *supra.*

Requiring a plaintiff to resort *ab initio* to the state courts for redress of his federal constitutional right is regarded as inconsistent with the intent of § 1983 to provide "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." Mitchum v. Foster, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972). Indeed, the premise underlying § 1983's adoption was that the state courts could not be relied upon to protect these rights:

> "[The] legislative history [of § 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
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> . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242 (citation omitted)

The Supreme Court has also been emphatic in preserving the § 1983 plaintiff's right to a federal forum in cases in which the propriety of abstention has been at issue. In Zwickler v. Koota, holding abstention to have been im-

[3] Curtis relies on Financial Services, Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973). However, that case is readily distinguishable. First, both suits involved in *Ferrandina* were in federal court, thus the plaintiff had the opportunity to air its constitutional claim in a federal forum in the earlier suits. Second, the plaintiff in *Ferrandina* expressly postponed consideration of its constitutional claim to a later date. Third, the *Ferrandina* decision concerns a limited question of appealability and its discussion of waiver is dictum.

proper, the Court said:

> "In thus expanding federal judicial power [by adopting § 1983], Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .' Robb v. Connolly, 111 U.S. 624, 637 [4 S.Ct. 544, 551, 28 L.Ed. 542]. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" 389 U.S. 241, 248 (1967) (citations omitted).

Of course, *Zwickler* and the exhaustion cases did not arise from situations in which litigation was actually pending before the state courts. However, it would not be sound law to apply a different rule to such instances either on the theory that the cases mentioned above were intended solely to avoid the delay and inconvenience to the plaintiff of requiring him to commence a new suit in state court, which is not present in a case such as this, or that a federal court should, as Curtis argues here, decline jurisdiction to avoid duplicity of effort when a state court action is actually in progress. Such contentions are untenable in light of the Supreme Court's holding, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), that a litigant

who has been obliged by the abstention of a federal court to seek relief in the state courts cannot be precluded, without his consent, from returning to federal court to litigate his federal claims. As the Court stated:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.'" Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 [29 S.Ct. 192, 53 L.Ed. 382]. *Id.* at 415 (footnote omitted).

In fact, in a footnote which is particularly *apropos* to this case, the Court noted:

> "The reservation [of federal jurisdiction] may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." *Id.* at 422, n. 13.

In the instant case, plaintiffs, who were defendants in the state court proceedings, did not have available to them the option of removal to the federal court, inasmuch as the federal claim arose only defensively. C. Wright Law of Federal Courts 52 (1963). However, upon their bringing the federal claim to this court in their own suit, no reason is apparent for departing from the principle enunciated above. Furthermore, the fact that in this case, unlike *England,* the state forum has been imposed on plaintiffs by the opposing litigant rather than the federal court strengthens the argument for preserving their right to press their federal claim here.

It is noteworthy, moreover, that if plaintiffs had in fact asserted their federal constitutional claim in the state court proceeding as Curtis insists they must, they would thereby have lost their right ever to litigate it in federal court. As the Court stated in *England:*

> "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Thus, defendant's position reduces itself to this: By the mere fact of being sued in state court, without which the order of attachment which is the *sine qua non* of this suit could not have issued, plaintiffs were placed in the position of either 1) waving their federal claim by not asserting it in state court or 2) asserting it in state court and electing to forego their federal remedy. Such a position is incompatible with the purpose of § 1983, and we decline to adopt it.

Curtis further requests us to abstain from exercising jurisdiction and to dismiss in order to allow the state courts to adjudicate the issues raised here. Putting aside the very serious question of whether there is any justification for abstention, we note merely that it is the law in this Circuit that abstention is a question for decision by the three judge court. New York State Waterways Association, Inc. v. Diamond, 469 F.2d 419, 423 (2d Cir. 1972); Johnson v. Rockefeller, 58 F.R.D. 42, 48 (S.D.N.Y. 1972).

III.

We turn to plaintiffs' motion to convene a three judge court pursuant to 28 U.S.C. § 2281. The motion should be granted if the complaint at least formally alleges a basis for equitable relief and raises a substantial constitutional question (Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962)), if it attacks a state statute's general application and names a state officer as a defendant (Ince v. Rockefeller, 290 F.Supp. 878, 881 (S.D.N.Y. 1968)). The only prerequisite as to which there is an issue here is whether this case presents a substantial constitutional question.

The determination of that point hangs on whether or not the constitutional issue presented is foreclosed by decisions of the Supreme Court which are analogous to the case at hand. California Water Service Co. v. City of Redding, 304 U.S. 252, 255, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). The "foreclosure" hurdle is not a high one. As the Supreme Court stated in Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed.2d 36 (1973):

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious', Bailey v. Patterson, 369 U.S. [31], at 33 [82 S.Ct.

549, 551, 7 L.Ed.2d 512]; 'wholly insubstantial,' *ibid.;* 'obviously frivolous,' Harnis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [30 S.Ct. 326, 327, 54 L.Ed. 482] (1910); and 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32 [54 S.Ct. 3, 4-5, 78 L.Ed. 152] (1933). The limiting words 'wholly' and 'obviously' have/cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if '"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to versy."' Ex parte Poresky, *supra,* at 32 [54 S.Ct., at 4], quoting from Hannis Distilling Co. v. Baltimore, *supra,* [216 U.S.] at 288 [30 S. Ct., at 327]; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-106 [53 S.Ct. 549, 550, 77 L.Ed. 1062] (1933); McGilvra v. Ross, 215 U.S. 70, 80 [30 S.Ct. 27, 31, 54 L.Ed. 95] (1909)."

Curtis argues that even under *Goosby's* lenient standard, plaintiffs' claim is too insubstantial to require the convening of a three judge court, because the grounds for their challenge to the statute have been destroyed by the Supreme Court's recent decision in Mitchell v. W. T. Grant Co., 42 U.S.L.W. 4671 (U.S., May 13, 1974). In *Mitchell,* the Court upheld the constitutionality of the Louisiana sequestration statute in the face of an attack based on Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and Sniadach v. Family Finance Corp., 395

U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the cases on which plaintiffs primarily rely.

Both *Fuentes* and *Mitchell* involved statutes permitting *ex parte* pre-judgment seizure of property pursuant to a vendor's lien. In *Fuentes,* two such statutes were declared invalid; in *Mitchell,* the statute was upheld.

The *Mitchell* Court distinguished *Fuentes* on several grounds. The sole factual distinction between *Fuentes* and *Mitchell* was that, in the latter, the Court found that the writ of sequestration was available only to avoid waste or alienation of the property subject to the lien with a corresponding risk of destruction or disposition of the property if notice was given to the purchaser-lienee. As to the procedural differences, the statute in *Mitchell* accorded the following protections not available under the statutes struck down in *Fuentes*: 1) The requirement of judicial approval of the sequestration order; 2) the necessity of clearly demonstrating the grounds for sequestration in the affidavit supporting the writ; 3) the posting of a bond by the attaching creditor; 4) the availability of a hearing and dissolution of the attachment order unless the party obtaining sequestration proves the grounds underlying the order; and 5) the ability of the buyer to regain possession of the sequestered property by posting a bond.

Curtis argues that the strong similarity between the statute under attack here and the statute upheld in *Mitchell* requires a finding that the *Mitchell* decisions forecloses submitting plaintiffs' constitutional challenge to a three judge court. We agree that significant parallels exist between the two statutes. Like the Louisiana statute, the first of the three provisions of Article 62 of the CPLR, pursuant to which plaintiffs' property was seized, authorizes attachment where there is reason to fear that the debtor has or may place beyond the reach of the creditor

property which could be used to satisfy the debt. This sub-section, CPLR § 6201(4), establishes as a ground for attachment that "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts." The second provision challenged by plaintiffs, permitting attachment when "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability" (CPRL § 6201(5)), and the third, authorizing attachment if "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit" (CPLR § 6201(8)), do not follow as closely the *Mitchell* justification of avoiding waste or destruction of property. Nonetheless, it presumably embodies the inference that fraudulent activity by a defendant giving rise to a lawsuit may indicate the defendant's willingness to commit fraud to avoid payment of a judgment resulting from the lawsuit.

More significant, however, are the procedural similarities between Article 62 and the *Mitchell* statute. Like the latter, the former provides for judicial approval of the attachment order based on a showing by affidavit and other written evidence that there is a cause of action and that one or more grounds for attachment exist. CPLR § 6212(a). Like the creditor in *Mitchell*, the New York creditor must post a bond to indemnify the debtor for damages and legal fees in the event that the attachment proves not to be justified. CPLR § 6212(b). As in *Mitchell*, the New York statute provides that "[p]rior to the application of property or debt to the satisfaction of a judgment, any interested person may commence a special proceeding against the plaintiff to determine the rights of adverse claimants to the property or debt." CPLR § 6221. Furthermore, the statute, like that in *Mitchell*, enables a party whose

property is attached to regain possession of it by giving an undertaking equal the value of the property or the debt. CPLR § 6222.

However, notwithstanding the striking resemblance between the *Mitchell* statute and Article 62, we find that plaintiffs' challenge to the latter is not foreclosed by the Supreme Court's upholding of the former, because of two differences between *Mitchell* and the case at hand which are significant according to the *Goosby* test. First, *Mitchell* dealt with a situation in which the creditor, by virtue of a vendor's lien, had an actual possessory interest in the attached property. As the majority opinion in *Mitchell* states:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized." 42 U.S.L.W. at 4672-4673 [94 S.Ct. at 1898].

Second, the type of situation found in *Mitchell*, where the grounds for attachment—existence of a vendor's lien and default by the buyer—can readily be established on documentary evidence (42 U.S.L.W. at 4677), differs radically from the case at hand, where the basis for attachment—fraud—is not amenable to such proof.

These distinctions may seem slender in view of the broad language employed in parts of the *Mitchell* decision (see, particularly, Part II of the majority opinion). Nonetheless, we feel constrained to grant plaintiffs' motion to convene a three judge court in light of the breadth of the *Goosby* holding. We note further that even if this result were not required as to the total debt, under *Fuentes*, that

Appendix B, Opinion and Order Convening Three-Judge Court (377 F.Supp. 1055).

part of the attachment which represents garnishment of plaintiff Sugar's wages might require submission of the case to a three judge court under *Sniadach*, whose precedential value as to such garnishment is unaffected by *Mitchell*. (*See* 42 U.S.L.W. at 4675-4676).

Accordingly, defendant's motion to dismiss is denied. Plaintiffs' motion to convene a three judge court is granted.

It is so ordered.

Appendix C, Judgment Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COUNTER-JUDGMENT
74 Civ. 78
(MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. McCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

Plaintiffs having commenced an action for a declaration that Article 62 of the Civil Practice Law and Rules (CPLR) of the State of New York is unconstitutional,

Now, upon the pleadings,

IT IS HEREBY ADJUDGED that plaintiffs' motion for a declaratory judgment and injunctive relief is hereby granted to the extent indicated herein, and it is further

ORDERED and ADJUDGED that the Civil Practice Law and Rules of the State of New York, § 6201, subsec. (4), (5)

and (8), as allowed under § 6211, is declared unconstitutional and the operation of said § 6201 (4), (5) and (8) are hereby enjoined against plaintiffs, and it is further

ORDERED and ADJUDGED that the defendants are enjoined from enforcement of CPLR, Article 62 against plaintiffs in cases of attachment under subsec. (4), (5) and (8) of § 6201, as granted under § 6211, until and unless a meaningful opportunity to vacate an attachment is provided under CPLR 6223 or by the Courts of the State of New York and it is further

ORDERED and ADJUDGED that the defendant Sheriff of the City of New York, release said attachment of plaintiffs' property now being held without any deduction for fees, costs or expenses and it is further

ORDERED and ADJUDGED that the herein judgment be stayed on condition that the defendants (one or all) timely file a notice of appeal to the United States Supreme Court as provided by law, and such stay continue until disposition of the appeal or until further order of the Supreme Court.

Dated: New York, New York, November 1, 1974.

WILFRED FEINBERG
HON. WILFRED FEINBERG
U.S.C.J.

MORRIS E. LASKER
HON. MORRIS E. LASKER
U.S.D.J.

RICHARD OWEN
HON. RICHARD OWEN
U.S.D.J.

JUDGMENT ENTERED:—11-6-74

RAYMOND F. BURGHARDT
Clerk.

Appendix D, Notice of Appeal (Curtis and Continental).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ 78 (MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. MCCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendants, Curtis Circulation Company and Continental Casualty Company, in the above named action hereby appeal to the Supreme Court of the United States from the judgment entered on November 6, 1974 which *inter alia* declared unconstitutional the Civil Practice Law and Rules of the State of New York, Section 6201, subsections (4), (5) and (8) as allowed under Section 6211 of said Act, and from each and every part thereof, except the stay of said judgment contained in the last paragraph thereof.

Appendix D, Notice of Appeal (Curtis and Continental).

This appeal is taken pursuant to Title 28 U.S.C. 1253.

Dated: November 27, 1974.

YOUNG, SONNENFELD & BUSNER

By S/ PHILIP H. BUSNER
A Member of the Firm
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JOHN J. MCCLOSKEY
Sheriff of the City of New York
31 Chambers Street
New York, New York 10007
(212) 374-5600

Filed: Clerk's Office United States
District Court, Southern
District of New York,
November 29, 1974.

Appendix E, Notice of Appeal (Wilson, Lefkowitz, Fine and Beisheim).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 78 (MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. MCCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, that defendants Wilson, Lefkowitz, Fine and Beisheim hereby appeal to the United States Supreme Court from a final judgment of a statutory three-judge District Court entered in the United States District Court for the Southern District of New York on November 6, 1974, and this appeal is taken from each and every part of the judgment except

Appendix E, Notice of Appeal (Wilson, Lefkowitz, Fine and Beisheim).

the last decretal paragraph which stayed the judgment on condition that this notice of appeal be timely filed.

Dated: New York, New York, November 26, 1974.

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Wilson, Fine, Beisheim
and Pro Se
By:

s/ A. Seth Greenwald
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New York, New York 10022

Filed: Clerk's Office United States
District Court, Southern
District of New York,
November 27, 1974.

Appendix F, Article 62 of the Civil Practice Law and Rules (New York).

6201. Grounds for attachment.

6202. Debt or property subject to attachment; proper garnishee.

6203. Attaching creditor's rights in personal property.

6204. Discharge of garnishee's obligation.

6211. Order of attachment.

6212. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers.

(b) Undertaking.

(c) Filing.

(d) Demand for papers.

6213. Service of summons.

6214. Levy upon personal property by service of order.

(a) Method of levy.

(b) Effect of levy; prohibition of transfer.

(c) Seizure by sheriff.

(d) Proceeding to compel payment or delivery.

(e) Failure to proceed.

6215. Levy upon personal property by seizure.

6216. Levy upon real property.

6217. Additional undertaking to carrier garnishee.

6218. Sheriff's duties after levy.

(a) Retention of property.

(b) Inventory.

Appendix F, Article 62 of the Civil Practice Law and Rules (New York).

6219. Garnishee's statement.

6220. Disclosure.

6221. Proceeding to determine adverse claims.

6222. Discharge of attachment.

6223. Vacating or modifying attachment.

6224. Annulment of attachment.

6225. Return of property; directions to clerk and sheriff.

6226. Disposition of attached property after execution issued; priority of orders of attachment.

§ 6201. Grounds for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

Appendix F, Article 62 of the Civil Practice Law and Rules (New York).

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

§ 6202. Debt or property subject to attachment; proper garnishee.

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 105 shall be construed to mean "defendant."

§ 6203. Attaching creditor's rights in personal property.

Where a plaintiff has delivered an order of attachment to a sheriff, the plaintiff's rights in a debt owed to the defendant or in an interest of the defendant in personal property against which debt or property a judgment may

be enforced, are superior to the extent of the amount of the attachment to the rights of any transferee of the debt or property, except:

1. a transferee who acquired the debt or property before it was levied upon for fair consideration or without knowledge of the order of attachment; or

2. a transferee who acquired the debt or property for fair consideration after it was levied upon without knowledge of the levy while it was not in the possession of the sheriff.

§ 6204. Discharge of garnishee's obligation.

A person who, pursuant to an order of attachment, pays or delivers to the sheriff money or other personal property in which a defendant has or will have an interest, or so pays a debt he owes the defendant, is discharged from his obligation to the defendant to the extent of the payment or delivery.

§ 6211. Order of attachment.

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

Rule 6212. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers. On motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203 that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff.

(b) Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the de-

mand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in the action.

§ 6213. Service of summons.

An order of attachment granted before an action is commenced is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, except that a person upon whom the order of attachment is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity. If the defendant dies within sixty days after the order is granted and before the summons is served upon him or publication is completed, the order is valid only if the summons is served upon his executor or administrator within sixty days after letters are issued. Upon such terms as may be just and upon good cause shown the court may extend the time, not exceeding sixty days, within which the summons must be served or publication commenced pursuant to this section, provided that the application for extension is made before the expiration of the time fixed.

§ 6214. Levy upon personal property by service of order.

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a

person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(b) Effect of levy; prohibition of transfer. A levy by service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, he owes a debt to the defendant or he is in the possession or custody of property in which he knows or has reason to believe the defendant has an interest, or if the plaintiff has stated in a notice which shall be served with the order that a specified debt is owed by the person served to the defendant or that the defendant has an interest in specified property in the possession or custody of the person served. All property in which the defendant is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the defendant, shall be subject to the levy. The person served with the order shall forthwith transfer or deliver all such property, and pay all such debts upon maturity, to the sheriff and execute any document necessary to effect the payment, transfer or delivery. After such payment, transfer or delivery, property coming into the possession or custody of the garnishee, or debt incurred by him, shall not be subject to the levy. Until such payment, transfer or delivery is made, or until the expiration of ninety days after the service of the order of attachment upon him, or of such further time as is provided by any subsequent order of the court served upon him whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the

sheriff, except upon direction of the sheriff or pursuant to an order of the court. A garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at the direction of any person other than the defendant authorized to direct sale or transfer, provided that the proceeds in which the defendant has an interest be retained subject to the levy. A plaintiff who has specified personal property or debt to be levied upon in a notice served with an order of attachment shall be liable to the owner of the property or the person to whom the debt is owed, if other than the defendant, for any damages sustained by reason of the levy.

(c) Seizure by sheriff. Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.

(d) Proceeding to compel payment or delivery. Where property or debts have been levied upon by service of an order of attachment, the plaintiff may commence a special proceeding against the garnishee served with the order to compel the payment, delivery or transfer to the sheriff of such property or debts, or to secure a judgment against the garnishee. Notice of petition shall also be served upon the sheriff. A garnishee may interpose any defense or counterclaim which he might have interposed against the defendant if sued by him. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 6221.

(e) Failure to proceed. At the expiration of ninety days after a levy is made by service of the order of attachment,

or of such further time as the court, upon motion of the plaintiff, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received or as to which a proceeding under subdivision (d) has been commenced.

§ 6215. Levy upon personal property by seizure.

If the plaintiff shall so direct and shall furnish the sheriff indemnity satisfactory to him or fixed by the court, the sheriff, as an alternative to the method prescribed by section 6214, shall levy upon property capable of delivery by taking the property into his actual custody. The sheriff shall forthwith serve a copy of the order of attachment in the manner prescribed by subdivision (a) of section 6214 upon the person from whose possession or custody the property was taken.

§ 6216. Levy upon real property.

The sheriff shall levy upon any interest of the defendant in real property by filing with the clerk of the county in which the property is located a notice of attachment indorsed with the name and address of the plaintiff's attorney and stating the names of the parties to the action, the amount of the plaintiff's claim and a description of the property levied upon. The clerk shall record and index the notice in the same books, in the same manner and with the same effect, as a notice of the pendency of an action.

§ 6217. Additional undertaking to carrier garnishee.

A garnishee who is a common carried may transport or deliver property actually loaded on a conveyance, notwithstanding the service upon him of an order of attachment, if it was loaded without reason to believe that an order

of attachment affecting the property had been granted, unless the plaintiff gives an undertaking in an amount fixed by the court, that the plaintiff shall pay any such carrier all expenses and damages which may be incurred for unloading the property and for detention of the conveyance necessary for that purpose.

§ 6218. Sheriff's duties after levy.

(a) Retention of property. The sheriff shall hold and safely keep all property or debts paid, delivered, transferred or assigned to him or taken into his custody to answer any judgment that may be obtained against the defendant in the action, unless otherwise directed by the court or the plaintiff, subject to the payment of the sheriff's fees and expenses. If the urgency of the case requires, the court may direct sale or other disposition of property, specifying the manner and terms thereof, with or without notice.

(b) Inventory. Within fifteen days after service of an order of attachment or forthwith after such order has been vacated or annulled, the sheriff shall file an inventory of property seized, a description of real property levied upon, the names and addresses of all persons served with the order of attachment, and an estimate of the value of all property levied upon.

§ 6219. Garnishee's statement.

Within ten days after service upon a garnishee of an order of attachment, or within such shorter time as the court may direct, the garnishee shall serve upon the sheriff a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defend-

ant has an interest, and the amounts and value of the debts and property specified. If the garnishee has money belonging to, or is indebted to, the defendant in at least the amount of the attachment, he may limit his statement to that fact.

§ 6220. Disclosure.

Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant.

§ 6221. Proceedings to determine adverse claims.

Prior to the application of property or debt to the satisfaction of a judgment, any interested person may commence a special proceeding against the plaintiff to determine the rights of adverse claimants to the property or debt, by serving a notice of petition upon the sheriff and upon each party in the same manner as a notice of motion. The proceeding may be commenced in the county where the property was levied upon, or in the county where the order of attachment is filed. The court may vacate or discharge the attachment, void the levy, direct the disposition of the property or debt, direct that undertakings be provided or released, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give. If the court determines that the adverse claim was fraudulent, it may require the claimant to pay the plaintiff the reasonable expenses incurred in the proceeding, including reasonable

attorney's fees, and any other damages suffered by reason of the claim.

§ 6222. Discharge of attachment.

A defendant whose property or debt has been levied upon may move, upon notice to the plaintiff and the sheriff, for an order discharging the attachment as to all or a part of the property or debt upon payment of the sheriff's fees and expenses. On such a motion, the defendant shall give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking. Making a motion or giving an undertaking under this section shall not of itself constitute an appearance in the action.

§ 6223. Vacating or modifying attachment.

Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

§ 6224. Annulment of attachment.

An order of attachment is annulled when the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the plaintiff is fully satisfied, or a judgment is entered therein in favor of the defendant. In the last specified case a stay of proceedings suspends the effect of the annulment, and a reversal or vacating of the judgment revives the order of attachment.

§ 6225. Return of property; directions to clerk and sheriff.

Upon motion of any interested person, on notice to the sheriff and each party, the court may direct the clerk of any county to cancel a notice of attachment and may direct the sheriff to dispose of, account for, assign, return or release any property or debt, or the proceeds thereof, or any undertaking, or to file additional inventories or returns, subject to the payment of the sheriff's fees and expenses. The court shall direct that notice of the motion be given to the plaintiffs in other orders of attachment, if any, and to the judgment creditors of executions, if any, affecting any property or debt, or the proceeds thereof, sought to be returned or released.

§ 6226. Disposition of attached property after execution issued; priority of orders of attachment.

Where an execution is issued upon a judgment entered against the defendant, the sheriff's duty with respect to custody and disposition of property or debt levied upon pursuant to an order of attachment is the same as if he had levied upon it pursuant to the execution. The priority among two or more orders of attachment against the same defendant shall be in the order in which they were delivered to the officer who levied upon the property or debt. The priority between an order of attachment and an execution, or a payment, delivery or receivership order, is set forth in section 5234.